No. 94-178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Supreme Court, U.S.
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NEAL W. THOMPSON, and
PRECISION PROCESSING, INC.

Petitioners,

v.

KENTUCKY FRIED CHICKEN
CORPORATION, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE PARTIES

Pursuant to Supreme Court Rule 29.1, the parent companies and subsidiaries (except wholly owned subsidiaries) of respondents are: PepsiCo, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent KFC Corporation ("KFC") respectfully submits this brief in opposition to the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in Thompson v. Kentucky

Fried Chicken Corporation, No. 93-5158 (6th Cir. March 23, 1994)(per curiam).

STATEMENT OF THE CASE

Petitioners Neal W. Thompson and Precision Processing, Inc. filed a complaint in 1985 alleging misappropriation of trade secrets. Petitioners alleged that between 1967 and 1969, respondent KFC misappropriated the pressure drain feature of petitioners' pressure chicken cooker and, without compensating petitioners, used that feature in respondent's cooker. In an apparent effort to bolster their complaint, petitioners also alleged a variety of other claims including RICO violations, antitrust violations, unjust enrichment, breach of contract, tortious inducement of refusal to deal and discrimination in violation of the civil rights laws.

Petitioners conducted over five years of discovery in an effort to uncover evidence and facts to support their trade secret claim and other claims. Mountains of docu-

ments were produced, the parties answered copious written discovery including requests for admissions and close to 50 depositions were taken comprising thousands of pages of transcripts. During this five-year discovery period, petitioners agreed to dismiss with prejudice their antitrust claims.

After discovery confirmed that respondent did not misappropriate petitioners' trade secret claim, respondent filed a motion for summary judgment. In the motion, respondent also provided multiple alternate grounds showing why none of petitioners' claims were viable.

The District Court Decision. In January, 1993, the District Court for the Western District of Kentucky granted summary judgment for respondent.

The district court disposed of petitioners' trade secret and unjust enrichment claims because they were time barred. The district court also determined that petitioners' discrimination claims under 42 U.S.C. Sections 1981, 1985

and 1986 stated no claim. Allegations of racial bias in the performance of the 1983 Joint Development Agreement stated no claim because the civil rights statutes do not reach post-formation discrimination in the performance of a contract. The court determined that all other allegations of discrimination were time-barred because the applicable limitations period is only one year, and the conduct allegedly occurred between eighteen and three years before the filing of petitioners' original complaint.

The district court also dismissed petitioners' claims for breach of contract and inducing refusal to deal because more than five years of discovery showed that petitioners had no evidence to support these claims and there was nothing more than "a jumble of facts, accusation and innuendo devoid of legal support." Petition at A-20.

Finally, the district court dismissed petitioners' RICO claim because there was no pattern of racketeering activity necessary to sustain such a claim.

The Sixth Circuit Decision. Petitioners appealed the district court's decision. After the benefit of full briefing and oral argument, the Sixth Circuit, in a per curiam decision, affirmed the district court's grant of summary judgment for the reasons contained in the district court's opinion. On April 5, 1994, petitioners filed a petition with the Sixth Circuit for a rehearing en banc. The petition for rehearing was circulated to all the active judges of the Sixth Circuit. When no judge of the Sixth Circuit requested a vote for rehearing, the petition was referred to the members of the original Sixth Circuit panel that heard the petitioners' appeal. That panel further reviewed the petition for rehearing and, on April 29, 1994, denied petitioners' request for rehearing en banc.

REASONS FOR DENYING THE WRIT

Petitioners have cited no "special and important reasons" warranting a grant of the writ of certiorari. Sup. Ct. R. 10. The proceedings in the district court and the

Sixth Circuit have not "departed from the accepted and usual course of judicial proceedings . . . as to call for any exercise of this Court's power of supervision." Sup. Ct. R. 10. Furthermore, there is no conflict between the decision of the Sixth Circuit below and the decision of any other United States Court of Appeals or of this Court. This is simply a case where the petitioners disagreed with the district court and the court of appeals when those courts independently determined that there was no evidence to support petitioners' claims and others were barred as a matter of law. The Petition alleges no justification for review in this Court and indeed there is none.

THERE IS NO REVIEWABLE ISSUE RESULTING FROM THE DECISIONS OF THE COURTS BELOW

The district court and the Sixth Circuit did nothing that requires this Court to exercise its powers of supervision. Petitioners boldly assert that the courts below have "so far departed from the accepted and usual course of judicial proceedings" that this Court's review is necessary.

Yet petitioners point to nothing to support such an allegation except: (i) wild accusations that the courts below do not have the time, budget or the inclination to "sit at a civil trial brought by a black individual against a major corporation;" and (ii) accusations that the courts below improperly drew inferences in favor of respondent and granted respondent's motion for summary judgment. See Petition For Writ of Certiorari at 11-12. Neither statement could be further from the truth.

A. The District Court and the Sixth Circuit Gave Petitioners Every Opportunity To Present and Prove Their Claims.

A quick perusal of the proceedings below confirms that the district court provided every procedural and substantive opportunity for the petitioners to prove their trade secret and other claims. The civil docket sheet reflects that the voluminous record of the district court proceedings occupies eight binders and contains over 200 individual documents. A magistrate was appointed by the

district court to resolve discovery disputes. After five years of discovery, petitioners filed not only a brief but an appendix of 105 exhibits in opposition to respondent's summary judgment motion. Finally, as the summary judgment oral argument transcript confirms, the district court heard nearly four hours of oral argument and in fact reviewed and was familiar with all of petitioners' cited law and proffered evidence.

Petitioners' opportunity to prove their case did not end with the district court. On the appeal of the district court's grant of summary judgment, petitioners again filed a brief and a four-volume appendix of exhibits. Moreover, petitioners not only had the benefit of an oral argument before the Sixth Circuit, they also filed a petition for rehearing en banc. Thus, like the district court, the Sixth Circuit gave petitioners the opportunity to take advantage of every conceivable procedure available to them. The fact that this action has been actively pursued and heard

since 1985 belies petitioners' assertions that the courts below had no inclination to hear their action. Accordingly, petitioners' allegation that the courts below gave them short shrift is entirely spurious and this Court's supervision is unnecessary.

B. The District Court and the Sixth Circuit Properly Applied Accepted, Commonplace Principles of Law.

In the courts below, the issues on summary judgment were not novel. Indeed, issues regarding statutes of limitations, state contract and tort law and the federal civil rights laws involve everyday legal principles applied to the facts of this case. Moreover, aside from the reasons articulated by the district court, there were additional grounds to grant summary judgment on petitioners' claims that the district court never had to reach.

When resolving these issues, the courts below neither weighed evidence nor drew inferences in favor of respondent. Quite the contrary, in accordance with the

settled principles of Celotex Corp. v. Catrell, 477 U.S. 317 (1986), the district court below accepted petitioners' version of the facts. It was petitioners' own admissions and their lack of evidence (despite five years of discovery) that indisputably demonstrated that summary judgment for respondent was proper. For example, petitioners' RICO allegations failed to state a claim because petitioners had no evidence that respondent acted in any way that constituted a pattern of racketeering. Additionally, petitioners' breach of contract claim failed because there was "no evidence other than unsupported accusation" that respondents falsified the results of the tests conducted pursuant to the Joint Development Agreement.[1] Petition at A-19. Finally,

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[1] Petitioners' claim of falsified test results is an illustration of how they have obliterated the distinction between evidence and attorneys' arguments. Notwithstanding petitioners' arguments about respondent's supposed wrongdoing, the evidence showed that respondent did not falsify any test results under the Joint Development Agreement. Accordingly, the courts below properly reviewed the evidence, discredited petitioners' argument and, in

(continued...)

petitioners' inducing refusal to deal claim failed because petitioners admitted that they had no prospective sales or contracts with which respondent interfered. Petition at A-20.[2]

On appeal, the Sixth Circuit had the benefit of petitioners' briefs and oral argument in its review of, among other things, the above facts and the district court's decision. After this complete inquiry, the Sixth Circuit affirmed the district court's ruling for the exact reasons contained in the District Court's opinion. Contrary to

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[1](...continued)
accordance with the principles of Celotex, dismissed petitioners' breach of contract claim. Petition at A-19.

[2] As if these facts were not enough to warrant summary judgment, respondent also presented to the district court and to the Sixth Circuit alternative grounds for why each of petitioners' claims must fail. For example, respondent proved that petitioners' trade secret claim must fail because, in addition to the time bar, (i) respondent developed the concept of pressure drain independently; and (ii) the pressure drain cooking technology had already been developed and patented by others and was thus not a trade secret. Petition at A-8 - A-9.

petitioners' assertions, the courts below acted properly and, indeed, gave careful consideration to the applications of state statutes of limitations, state contract and tort law and federal civil rights statutes. Thus, what it boils down to is that petitioners are seeking one final opportunity to reargue issues which have been fully aired in the courts below.

Petitioners' brief betrays their intentions to do nothing except argue whether well settled legal principles were properly applied to this specific case and its specific facts. Indicative of what is to come, petitioners' first two questions present pure issues of fact that relate to whether the courts below applied the proper state's statute of limitations to petitioners' trade secret claim. Petition at i-ii. The remaining seven questions all flow in a similar vein and range from whether the courts below erred in finding the Joint Development Agreement unenforceably vague to whether respondents indeed acted prejudicially against petitioners. Petition at iii-vi. Put in this light, it becomes

clear that there is no reviewable issue here because certiorari petitions are not granted to review evidence and to discuss facts. United States v. Johnston, 268 U.S. 220, 227 (1925).

Although petitioners try to concoct an issue of law regarding whether respondents' refusal to exercise an option under a Joint Development Agreement constitutes discrimination prohibited by Section 1981, petitioners' attempt to do so must fail. Petitioners' brief does not disclose that they admitted that their discrimination claim is based on respondent's actions in the performance of the Joint Development Agreement.[3] Accordingly, the district

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[3] This is not a situation where the evidence is susceptible to a variety of interpretations. In the first set of request for admissions, petitioners were asked the following:

> Admit that any and all acts of racial discrimination allegedly committed by Defendants, other than those alleged acts of discrimination committed in connection with KFC's performance under the Joint Development

(continued...)

court and the Sixth Circuit properly determined that the complained-of misconduct fits squarely within the strictures that discriminatory performance of contractual obligations are not covered by Section 1981. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).[4]

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[3](...continued)

> Agreement (including the testing that took place thereunder and its subsequent termination), occurred prior to January 1, 1983.

Petitioners admitted that the above statement was true. Regardless of petitioners' vociferous denials, petitioners' admission bars all of their discrimination claims. Their admission shows that, with the exception of the Joint Development Agreement, the complained-of acts occurred at least two years prior to the date of the complaint and are time-barred under a one-year statute of limitations. As for the Joint Development Agreement, petitioners admitted that the alleged discriminatory acts there occurred during the performance of a contract thus taking the actions outside of the reach of the civil rights statutes.

[4] Alternatively, petitioners' attempt to characterize the option as a new contract is unavailing because the Sixth Circuit has ruled that post-formation conduct cannot be turned into pre-formation conduct by simply alleging that a new contract was sought. See, e.g., Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ., 926 F.2d 505, 509 (6th Cir.), cert. denied, 111 S. Ct. 2917 (1991)

(continued...)

In short, the district court and the Sixth Circuit correctly applied accepted, commonplace principles regarding state statute of limitations, state contract and tort law and the civil rights statutes. Accordingly, this Petition really asks this Court to exercise its supervisory powers and become the third court to review the summary judgment record. There is no reason for this Court to do so.

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[4](...continued)
(failure to automatically renew contract does not impede right to "make or enforce" contracts and thus is not cognizable under Section 1981); see also, Rick Nolan's Auto Body Shop, Inc. v. Allstate Ins. Co., 718 F. Supp. 721 (N.D. Ill. 1989)(cannot avoid Patterson and turn post-formation conduct into pre-formation conduct by merely alleging that a new contract was at issue). Petitioners have neither given a reason why this rule is inapplicable in the instant case nor given any indication that there is any conflict with regard to this issue within the circuits.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: September 1, 1994

Respectfully submitted,

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